IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
Appeal (L) No.144 of 2007
In
Miscellaneous Petition No.48 of 2006
In
Testamentary Petition No.940 of 1978

Merlyn Catherine Fialho. .. Appellant

Vs.

Malcolm Philip Fancis John
D'Lima alias Mally D'Lima. .. Respondent

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Shri Satish Shah with Ms Naina Dhupia i/b M/s.Nameet & Co. for the appellant.

Shri Karl Shroof i/b Dhru & Co. for the respondent.

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CORAM : R.M.S.KHANDEPARKAR &
D.G.KARNIK, JJ

DATED : 27TH APRIL, 2007

P.C.

1. Heard. The appellant challenges the order dated 14th December, 2006 passed in Miscellaneous Petition No.48 of 2006 in Testamentary Petition No.940 of 1978. By the said petition, the appellant sought an order for revocation of the probate granted on 28th October, 1982. The Learned Single Judge has rejected the misc. petition on various grounds. Though the impugned order is sought to be challenged on various grounds, the main contention of the appellant is that

no citation was served upon the appellant and the probate was issued without any opportunity being given to the appellant. The contention is seriously disputed on behalf of the respondent and attention is drawn to the three documents on record, viz. (i) Will dated 4th December, 1969, (2) Affidavit dated 12th March, 1982 and (3) the letter addressed to the trustees of Seth Mulraj Khatau Trust Settlement, Bombay, recorded on a stamp paper dated 20th April, 1982, while contending that the documents apparently disclose knowledge about the probate proceedings and her consent for issuance of probate which was ultimately issued in the year 1982. The learned advocate appearing for the appellant, on the other hand, submitted that it has been consistent case of the appellant that the signatures on those documents, to which attention was drawn, were not of the appellant and they were forged.

2. Perusal of the documents discloses that the Will dated 4th December, 1969 as also a receipt annexed to it dated 16th January, 1970 states that "received from my father (John D’Lima) the sum of Rs.15,000/- (Fifteen thousand only) as my dourey," and it bears the signature dated 16th January, 1970 and it is the contention of the respondent that it was

the signature of the appellant. In the Will in question in paragraph 5, it is stated that "I do hereby declare that I have reserved Rs.15,000/- (Rupees Fifteen thousand only) to be given as a dowry to my daughter MERLIN D'LIMA alias MERLIN CATHERINE D'LIMA on her marriage in January 1970 or thereafter and on the receipt of this amount by my said daughter, she shall not be entitled to any share in any of my properties moveable or immoveable."

3. The document in the form of affidavit dated 12th March, 1982 is of Merlin D'Lima alias Marlin Catherine D'Lima, Fialho, resident of Poona, and appears to have been executed before the Nazir, District & Session Court on 12th March, 1982 on being identified by Miss Maya S., a person known to the concerned deponent. In this affidavit, it is clearly recorded that the deponent was aware that the petition for probate of the Will of the deceased father of the deponent was filed by her brother and she has no objection to the grant of probate of the said Will.

4. The document in the form of letter recorded on a stamp paper dated 20th April, 1982 is regarding surrender of the tenancy/occupancy rights in the property of the trustees consequent to the death of

the deceased father on receipt of consideration. It bears signature of three persons and it is the contention that the signature at Sr.No.2 is of the appellant whereas the signatures on the letter as well as on the affidavit are not of the appellant. It is submitted on behalf of the appellant that the appellant is not in possession of any of the copies of these documents relating to the letter recorded on a stamp paper and inspection of the original documents was asked for and the same was given only of the xerox copies of the said documents and not of the original thereof.

5. Perusal of those documents apparently discloses that the same were executed by the appellant which would apparently disclose thorough knowledge about the probate proceedings to the appellant at the relevant time. It discloses also the consent on the part of the appellant for issuance of probate in terms of the Will. Considering the same, the Learned Single Judge has rejected the misc. petition for revocation of the grant of probate.

6. It is true that it is the contention of the appellant that the signatures on those documents were not affixed by the appellant and there is forgery in

that regard. However, apart from making bare allegation of forgery and disputing the signatures to that of the appellant on those documents, the appellant did not take any pain to establish the said contention. It was only when the matter reached the final argument before the Learned Single Judge, an attempt was made to seek leave of the Court to lead evidence of the expert witness in relation to the signatures of the appellant. Considering the fact that there was sufficient opportunity available to the appellant to lead evidence in that regard and the appellant was fully aware of the probate proceedings which were pending since long, the Learned Single Judge rejected the request for leave to lead evidence at that stage. In our considered opinion, no fault can be found with the said decision of the Learned Single Judge in the facts and circumstances of the case. Undisputedly, the appellant approached the Court for revocation of grant of probate more than 24 years after issuance of grant of probate. During all these years, the appellant did visit the respondent and the property in question. Added to this the above referred documents reveal full knowledge of the probate proceedings to the appellant. It is unbelievable that the appellant did not inquire of the ownership of the properties subsequent to the death of

her father for a period of nearly three decades. Once it was known to the appellant that the probate was issued as long back as in the year 1982 and the appellant approached the Court seeking revocation of the probate solely on the ground that there was no citation served upon the appellant, it was necessary for the appellant to lead evidence to prove that the signatures on the above referred documents were not of the appellant or that the signatures were forged. In the absence of any such evidence being placed on record at the appropriate time and in the appropriate manner, no fault could be found with the impugned order rejecting the claim of the appellant and dismissing the misc. petition for revocation of grant of the probate.

7. For the reasons stated above, therefore, in our considered opinion, there is no case made out for interference in the impugned order. Hence, the appeal fails and is hereby rejected.

(R.M.S.KHANDEPARKAR, J)

(D.G.KARNIK, J)